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One Year Review of Criminal Law and Procedure

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ONE YEAR REVIEW OF CRIMINAL LAW AND PROCEDURE

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In the field of criminal law, the Colorado Supreme Court during 1958[1] decided about the usual number of cases—some twenty-five. The Colorado Case of the Year,[2] which will doubtless prove to be the Colorado Criminal Case of the Decade because of its wide-spread impact upon what has theretofore been considered settled law, is one which has important effects both as to the substantive and as to the procedural aspects of criminal law.

I. SUBSTANTIVE CRIMINAL LAW

Municipal Violations as Crimes

There are a number of proceedings, often related to criminal matters, which are somewhat akin to criminal proceedings but which are commonly considered non-criminal (*i.e.*, civil) or at the most only quasi-criminal: habeas corpus proceedings (even when brought by an imprisoned convict);[3] juvenile delinquency proceedings;[4] proceedings to recover statutory money penalties from wrongdoers; proceedings, in connection with criminal prosecutions, to determine insanity subsequent to the crime;[5] and proceedings for violations of municipal penal ordinances.[6] The *Merris* case [7] strikes many Colorado municipal violations—up to 1958 uniformly held to be civil wrongs, not crimes—from the foregoing list. Henceforth, a municipal penal ordinance of a home rule city is a crime if (1) there exists a counterpart state statute punishing the same conduct *or* (2) the ordinance authorizes imprisonment as punishment.[8] The problem of whether the violation of the municipal ordinance of a non-home rule city is a crime under the same two circumstances is not decided by the *Merris* case and must await further word from the supreme court.[9]

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[1] Because of time limitations imposed by the editors of DICTA for the submission of this annual review, the cases discussed herein are those found in 319 P.2d through 332 P.2d no. 2, the latter containing Colorado cases decided on Nov. 24, 1958. No Colo. Bar Ass'n Adv. Sh. presently issued contains Colorado cases decided after Nov. 24, 1958.

[2] Canon City v. Merris, 323 P.2d 614 (Colo. 1958), which contains two important holdings: (1) making many municipal violations crimes; (2) limiting municipal power to enact penal ordinances.

[3] *E.g.*, McGrath v. Tinsley, 328 P.2d 579 (Colo. 1958); Riley v. Denver, 324 P. 2d 790 (Colo. 1958)—both noted *infra* at notes 60, 64 and text. Habeas corpus is also available to others than imprisoned convicts—e.g., infants in custody cases, aliens in deportation cases, and persons committed to mental institutions for reasons other than alleged criminal conduct.

[4] Kahm v. People, 83 Colo. 300, 264 Pac. 718 (1928). The principle type of juvenile delinquency is the commission by a juvenile of what would be a crime if committed by an adult. Colo. Rev. Stat. § 22-8-1 (1953).

[5] Colo. Rev. Stat. § 39-8-6 (1953) (insanity at the time of criminal trial, or of criminal judgment, or of execution of the death penalty for crime).

[6] The majority view in the United States is that municipal ordinance violations are civil wrongs against the municipality, even when the violation is punishable by imprisonment, and even when the state criminal law prohibits the same conduct which the ordinance forbids. 9 McQuillin, Municipal Corporations § 27.06 (3d ed. 1950).

[7] See note 2 *supra*. The case involved a home rule city municipal ordinance punishing, by fine or imprisonment, driving under the influence of liquor. A counterpart state statute also forbids the same conduct, though the authorized punishment is somewhat greater.

[8] Though the Merris case was somewhat vague as to item (2) above, the later case of Geer v. Alaniz, 326 P.2d 71 (1958), makes it clear that a municipal ordinance is a crime if imprisonment is authorized, even though there is no counterpart state statute; as well as a crime if there is a counterpart state statute, even though only a fine is authorized.

[9] See Scott, Municipal Penal Ordinances in Colorado, 30 Rocky Mt. L. Rev. 267, 279 (1958), urging that these violations also should be crimes if (1) there is a counterpart state criminal statute or (2) imprisonment is an authorized penalty.

The principal effect of this holding of the *Merris* case—that many municipal violations, formerly held to be civil wrongs, are crimes—has been procedural: the municipal courts which try municipal violators must henceforth afford defendants those procedural rights to which defendants are entitled in comparable state criminal trials. These will be considered under the topic "Criminal Procedure" below.

Power to Create Municipal Crimes

Besides turning many a municipal violation from a mere civil wrong into a crime, the *Merris* case severely limits the power of home rule municipalities to enact penal ordinances. Before *Merris,* Colorado followed the rule of most states to the effect that the state and the home rule city possess concurrent power to enact laws punishing identical conduct which is of both state-wide and local concern, so long as the city ordinance does not conflict with the state statute.[10] One of the holdings of the *Merris* case, however, is that, when a state criminal statute punishes conduct of state-wide concern, the home rule city has no power to enact a penal ordinance punishing the same conduct (and conversely, that where a home rule city has enacted a penal ordinance punishing conduct of local concern, a state statute punishing the same conduct is inapplicable to such conduct committed within the municipal territorial limits). Questions as to what are matters of state-wide concern (other than drunken driving, the specific matter involved in *Merris*) as distinguished from matters of local concern;[11] as to what is the power of a home rule municipality to enact an ordinance punishing conduct of state-wide concern in the absence of state law on the subject; as to whether the *Merris* case limits the municipal power of non-home rule cities to an equal degree; and as to whether certain Colorado statutory provisions delegating ordinance power concerning specific matters to "local authorities" and "cities and towns" permits concurrent power in spite of *Merris*—all such questions, not specifically raised by the *Merris* case, must await further answers by the supreme court.[12] It may be that some of the questions concerning municipal power to enact penal ordinances will be soon settled by legislation.[13]

Drunk-Driving Death Statute

An important Colorado criminal statute, poorly worded, makes it a felony, with a maximum punishment of fourteen years' imprisonment,

[10] Colorado: Hughes v. People, 8 Colo. 536, 9 Pac. 50 (1885) (punishment by state no bar to punishment by city); McInerney v. Denver, 17 Colo. 302 29 Pac. 516 (1892) (same); People v. Graham, 107 Colo. 202, 110 P.2d 256 (1941) (recognizing concurrent power as to traffic matters). Other states: 6 McQuillin, Municipal Corporations c. 23 (3d ed. 1950).

[11] The difficulty which will be encountered in classifying matters into one or the other of the two categories—matters of state-wide concern, matters of local concern—is that so often a matter really concerns both the state and the locality. Driving under the influence, held by *Merris* to be a state-wide matter, is surely also a matter of local concern—actually of special concern to the people of the locality where the driver does his driving.

[12] See Scott, *supra* note 9, at 270-75, for some speculation concerning the answers to these questions.

[13] The Colorado Municipal League has prepared a bill, to be offered in the 1959 legislative session, to amend Colo. Rev. Stat. § 139-33-1 (1953) so as to enlarge municipal power beyond the narrow limits imposed by the *Merris* case. The bill provides for concurrent state and municipal power (of home rule and non-home rule municipalities) concerning matters of both state and local concern, unless the state statute on the subject expressly preempts the field to the exclusion of municipal power. It further provides that, when both state and municipality punish the same conduct, prosecution by the state bars prosecution by the city and vice versa. The League proposes no legislation to change the other holding of the *Merris* case; that municipal violations are generally crimes, which must be prosecuted according to the laws relating to criminal procedure.

The proposed legislation, insofar as it enlarges the power of home rule cities, may have difficulty withstanding attack on the basis of its constitutionality, since the *Merris* case holding as to the municipal ordinance power of home rule cities relied primarily upon the provision of Colo. Const. art. XX, § 6 (the home rule amendment), that a home rule ordinance on a local matter "supersedes" a state statute on the subject; the supreme court in *Merris* concluded from this that the converse must follow: a state statute on a state-wide matter necessarily excludes municipal power.

for one, while under the influence of liquor or drugs, to cause the death of another by driving an automobile "in a reckless, negligent or careless manner, or with a wanton or reckless disregard of human life or safety."[14] The difficulty concerns the degree of negligence which the statute requires: will ordinary (tort) negligence do, as the words "careless" and "negligent" imply, or is some greater degree of negligence required, as the words "reckless" and "wanton or reckless disregard" indicate? In view of the statute's use of the disjunctive "or," it might seem that ordinary negligence, the lowest common denominator of the various alternative terms, would be sufficient.[15] *Goodell v. People*,[16] however, holds that a greater negligence—called "criminal negligence"—is necessary to satisfy the statute. The court reasoned that, since the crime of involuntary manslaughter, a mere misdemeanor, requires this higher degree of negligence,[17] a fortiori the drunk-driving-death crime, a serious felony, should require as high a degree of negligence.

"Ordinary negligence" requires, in cases of tort liability for death, that the defendant's conduct, under all the circumstances, create an unreasonable risk of harm to others, though the actor need not be aware that his conduct creates such a risk. "Criminal negligence" requires something more. But what is this something extra which criminal negligence needs but ordinary negligence does not? There are three possibilities: (1) a higher degree of risk than simply an unreasonable risk,[18] or (2) a subjective awareness by the defendant of the risk which his conduct creates, or (3) both a greater risk and an awareness of the risk. Though different jurisdictions give different answers, Colorado's answer seems to be the second of the above three: no greater risk is required for criminal negligence than for ordinary negligence, but (unlike the requirements for ordinary negligence) the defendant must be aware of the unreasonable risk which his conduct creates.[19] When, acting riskily and knowing he is doing so, he yet goes ahead with his conduct,

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[14] Colo. Rev. Stat. § 40-2-10 (1953). A companion statute, Colo. Rev. Stat. § 40-2-11 (1953), punishes as a felony, with a maximum punishment of five years, the same conduct which causes bodily injury instead of death.

[15] This is the view apparently adopted by the earlier case of Rinehart v. People 105 Colo. 123, 95 P.2d 10 (1939), purportedly distinguished in, but actually overruled by Goodell v. People, 327 P.2d 279 (Colo. 1958).

[16] 327 P.2d 279 (Colo. 1958), noted in 31 Rocky Mt. L. Rev. 104 (1958).

[17] Trujillo v. People, 133 Colo. 186, 292 P.2d 980 (1956), noted in 28 Rocky Mt. L. Rev. 409 (1956).

[18] When the criminal negligence issue concerns liability for involuntary manslaughter or drunk-driving-death, risk means risk of death or serious bodily injury; when criminal liability for battery or drunk-driving-injury is the issue, it means risk of bodily injury.

[19] See note, Criminal Law—The Negligence Requirement for Involuntary Manslaughter, 28 Rocky Mt. L. Rev. 409 (1956), reaching this conclusion on the basis of the Colorado cases, which are not, however, as clear as they might be.

he is an eligible candidate for a manslaughter (of the negligence type) or for a drunk-driving-death prosecution if death results.

The *Goodell* opinion puts its stamp of approval on the following instruction to the jury explaining the meaning of criminal negligence in a drunk-driving-death prosecution:

> "Criminal negligence is such a failure to observe the standard of conduct of an ordinarily careful and prudent person under the conditions and circumstances, that the actor's conduct partakes of a reckless disregard of life and a willful disregard of the safety of others; such conduct is the equivalent of the intentional doing of an act with knowledge that substantial harm will result and with a wanton and reckless disregard of the probable consequences of said act."[20]

With due respect, this is an almost meaningless string of words which cannot serve as a proper guide for the jury. If the actor conducts himself in such a way as to endanger others, but is serenely unaware of the danger, is he criminally negligent under this instruction? Though by hypothesis he is not conscious of the risk created by his conduct, does his conduct "partake" of a disregard of safety; is his conduct "the equivalent of" intentionally doing an act with knowledge of its riskiness? The trouble lies in such words as "partake" and "is the equivalent of," which seem to invite one to pretend that something exists (here, an awareness of risk) which does not actually exist. It would seem much clearer to instruct the jury, in manslaughter and drunk-driving-death prosecutions, somewhat along these lines:

> Criminal negligence requires (1) such a failure to observe the standard of conduct of an ordinarily careful and prudent person under the conditions and circumstances, that the actor's conduct creates an unreasonable risk of death or serious bodily injury to another or to others; and, in addition, (2) that the actor be conscious that his conduct creates such a risk.[21]

Confidence Game

When one obtains money or property from another in exchange for his check which later "bounces," there is often the troublesome problem

[20] 327 P.2d at 283.

[21] Perhaps "unreasonable risk" would require some further explanation to the jury. Taking a certain risk—say speeding through an intersection—may be reasonable if done for a socially useful reason (e.g., to speed a sick person to the hospital), or unreasonable if no such reason exists (e.g., to enjoy the thrill of fast driving)

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of whether he has violated the short-check (misdemeanor)[22] or no-account-check (felony, five years maximum) statutes,[23] or that punishing obtaining property by false pretenses[24] (felony, ten years maximum, if over $50 obtained); or the confidence game (felony, twenty years maximum) statute.[25] *Bevins v. People*[26] discloses some of the outer limits of the nebulous crime of confidence game. First, the crime requires more from the defendant than a promise, even a false promise (*i.e.*, one the defendant intends, at the time he makes it, not to keep).[27] Secondly, it requires something in the way of the defendant's worming his way into the victim's confidence, a requirement not satisfied when his confidence is obtained through a course of regular business dealings conducted by persons on an equal footing—admittedly a somewhat vague distinction.

Miscellaneous

Other Colorado cases concerned rather routine matters concerning the substantive law of larceny[28] and burglary.[29] Another case construed various Colorado statutes to mean that robbery, when committed by a youth over the age of juvenile delinquency but under twenty-one when convicted, is a felony rather than a misdemeanor.[30] Another upheld the constitutionality of the statute on habitual criminals.[31]

A 1958 murder of a Boulder, Colorado, policeman raises the interesting question of the meaning of the vague phrase "in the perpetration" found in the Colorado statute making it first degree murder for one to murder another "in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem or burglary."[32] Here hoodlums robbed a storekeeper in Lyons, then fled by car to Boulder, some fifteen miles away, arriving there half an hour after the robbery. Boulder policemen, alerted to watch for the robbers, stopped their car. One of the robbers shot and killed a policeman. "In the perpetration" is a matter of time, place and causal connection between the felony in question, here robbery, and the killing. Here the time element is half an hour; the place, fifteen miles away; the causal connection, the shooting was done to avoid capture. Doubtless the Colorado Supreme Court will have to decide the matter in the next year or two if the robbers, who have been captured, are convicted of first degree murder on the theory of a killing in the perpetration of the robbery.

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[22] Colo. Rev. Stat. § 40-14-10 (1953).
[23] Colo. Rev. Stat. § 40-14-10 (Supp. 1957).
[24] Colo. Rev. Stat. § 40-14-2 (Supp. 1957).
[25] Colo. Rev. Stat. § 40-10-1 (1953) (punishing one who obtains money or property "by means of . . . any false or bogus checks . . . .")
[26] 330 P.2d 709 (Colo. 1958). Here defendant obtained $20 from a store-owner by giving him his check for $20, asking him not to present the check to the bank but to hold it until a stated future date when defendant would return and repay the $20. The defendant and the storekeeper had entered into exactly the same transaction a half dozen times before, and the former had always appeared on the appointed day with the money. In this instance, the evening before the appointed day the defendant was arrested and jailed for a traffic violation. He then had on his person $26, from which he intended to repay the $20 he owed. Because he failed to keep the appointment, the storekeeper presented the check to the bank. The check "bounced." Defendant was convicted of the crime of confidence game and sentenced to eight to fifteen years in the penitentiary. The supreme court reversed and ordered his discharge, because on the evidence he was entitled to a directed verdict of acquittal.
[27] A false promise will not do for false pretenses, which requires a false representation as to an existing or past fact. People v. Orris, 52 Colo. 244, 121 Pac. 163 (1912). If a false promise is insufficient for false pretenses, a fortiori it should be insufficient for the more serious crime of confidence game. *Cf.* Goodell v. People, 327 P.2d 279 (Colo. 1958) (since involuntary manslaughter requires criminal negligence, a fortiori the drunk-driving-death offense does).
[28] Lee v. People, 326 P.2d 660 (Colo. 1958) (the fair market value of a gun stolen from a retail store—not its wholesale price or its retail price—is used to determine the issue of grand larceny v. petit larceny).
[29] McGrath v. Tinsley, 328 P.2d 579 (Colo. 1958) (in Colorado, burglary may be committed by entering without breaking); Panion v. People, 331 P.2d 501 (Colo. 1958) (same).
[30] Bartell v. People, 324 P.2d 378 (Colo. 1958).
[31] Vigil v. People, 322 P.2d 320 (Colo. 1958).
[32] Colo. Rev. Stat. § 40-2-3 (1953).

II. CRIMINAL PROCEDURE

Municipal Violations

As indicated above, one *Merris*[33] case holding—that municipal violations in home rule cities are crimes if there is a counterpart state criminal statute or if imprisonment is an authorized punishment—has its principal impact upon the procedure to be employed in municipal courts of home rule cities. Doubtless the many rules of criminal procedure, constitutional, statutory and case law, applicable to comparable state criminal prosecutions must now be employed in municipal prosecutions. As to constitutional requirements: trial in municipal courts must be speedy, public, impartial and local; the defendant has a right to be present; he has a right to cross-examine adverse witnesses.[34] Though he has a right to have employed counsel represent him, he probably has no right to appointed counsel if indigent, since no such right is afforded defendants in minor state criminal prosecutions. Probably the accusation must be more specific than heretofore. The defendant need not take the stand in his own defense (an aspect of the privilege against self-incrimination) and so cannot be questioned against his will by the municipal judge. There can no longer be prosecution both by the city and by the state on account of a single wrongful act (an aspect of double jeopardy). He is entitled to a jury trial if he requests one because justice courts afford trial by jury on request in comparable state criminal trials.[35]

The non-constitutional procedural requirements of the *Merris* case would seem to include: the defendant must be proved guilty beyond a reasonable doubt rather than by a mere preponderance; the trial judge may not direct a jury to find the defendant guilty; the rules of evidence applicable in comparable state criminal proceedings must be followed; the court may, in its discretion, suspend the sentence and place the violator on probation; among other things.[36]

Jurisdiction Over the Defendant

One who has, before his apprehension, committed both a federal and a state crime, may afterwards be arrested and held by the one sovereign or the other, and the one which first assumes control over the defendant has jurisdiction over him to the exclusion of the other. But that one may voluntarily relinquish jurisdiction to the other, and the defendant cannot complain. So when the defendant, who has been arrested, tried, convicted and sentenced to imprisonment by the federal government, is handed over by the federal government, during the period of his imprisonment, for trial in the Colorado state courts, there is no obstacle to the defendant's trial for his Colorado crime.[37]

[33] Canon City v. Merris, 323 P.2d 614 (Colo. 1958) (commented on in note 2 *supra*, as further explained by Geer v. Alaniz, note 8 *supra*).

[34] No doubt all these rights existed before *Merris*.

[35] It would seem that trial by jury in justice courts is, however, not a constitutional right but one granted by statute, so that the legislature could, if it wished, abolish trial by jury in justice and municipal courts. Municipal courts of home rule cities, however, seem to have made, since *Merris*, a quick adjustment to the trial-by-jury requirements imposed by that case, affording a jury trial to municipal defendants who ask for it.

[36] For a more complete discussion of the procedural consequences of *Merris*, see Scott, *supra* note 9, at 279-82.

[37] Gonzales v. Horan, 332 P.2d 205 (Colo. 1958) (state court issued writ of habeas corpus ad prosequendum directed to the federal warden, who, pursuant to regulation of the attorney general, voluntarily produced his prisoner in the state court). The court also held that when the Colorado district judge earlier quashed a capias for the defendant's arrest, this did not operate to dismiss the information previously filed against the defendant.

Jurisdiction Over the Offense

The Colorado county courts have jurisdiction to try cases of wilful non-support of wife and minor children,[38] though the crime of non-support is a felony. A Colorado case held that the county court has power to suspend sentence on condition the defendant pay $18,000, in installments, for the support of his family, though in other matters the jurisdiction of the county court is limited to matters involving less than $2,000.[39]

Writ of Prohibition

Colorado defense attorneys in 1958 rediscovered the ancient prerogative writ of prohibition, a useful pre-trial maneuver to prevent the threatened trial of a criminal defendant, available in limited circumstances of somewhat uncertain dimensions but related to a lack of "jurisdiction" in the criminal trial court. In *Bustamante v. District Court*[40] the trial court had erroneously refused to quash the indictment, though the prosecution was barred by the statute of limitations. In *Markiewicz v. Black*[41] the trial court had wrongly refused to dismiss a prosecution that was barred by the fact that the defendant had already been once in jeopardy for the same offense. In each case the petitioner, the threatened criminal defendant, filed his petition for the writ in the supreme court, seeking to restrain the respondent trial court from proceeding to trial. After issuing an order to the respondent to show cause why the writ should not be granted, the rule to show cause was made absolute and respondent thus restrained.

In the *Bustamante* case the supreme court said that although the writ "cannot be used for appealing cases on the installment plan," yet it can be used in cases where the trial court, having no jurisdiction over the subject matter or over the person of the petitioner, still threatens to try him. To say that the trial court thus lacks jurisdiction because the offense is barred by the statute of limitations is surely to use the word "jurisdiction" in a pretty loose sense.

In the *Markiewicz* case the court merely said that if prohibition is proper when a threatened prosecution is barred by a mere statute, a fortiori it is available for a threatened prosecution barred by a provision of the constitution. While thus giving pre-trial prohibition a rather broad scope, the supreme court continues to limit narrowly the scope of another (a post-conviction) prerogative writ, that of habeas corpus.[42] How far the court will go with prohibition to restrain trial courts which have improperly ruled in other situations—*e.g.*, improperly ruled there is venue, or wrongly refused to quash a fatally defective indictment or information, or perhaps even improperly failed to appoint counsel for the defendant—remains to be developed by future cases.

Statute of Limitations

The *Bustamante* case, noted immediately above, also dealt with the problem of the validity of a criminal accusation which on its face discloses that the period of the statute of limitations has run and which does not allege facts (*e.g.*, that the defendant fled from justice) taking the

[38] Colo. Rev. Stat. § 43-1-4 (1953) ("All courts of record").
[39] Tucker v. People, 136 Colo. 581, 319 P.2d 983 (1957, adhered to on rehearing 1958).
[40] 329 P.2d 1013 (Colo. 1958).
[41] 330 P.2d 539 (Colo. 1958).
[42] In dealing with habeas corpus the Colorado courts refuse to allow the writ to release convicted persons unless the trial court lacked "jurisdiction" in a much more limited sense than that word was used in Bustamente. See, for instance, Lewis v. Tinsley, 330 P.2d 532 (Colo. 1958) (court has "jurisdiction" though defendant is not represented by effective counsel, is insane when arraigned, is coerced into pleading guilty).

prosecution out of the statute of limitations.[43] Prior Colorado cases had held that the accusation is not to be quashed because it alleges dates which show the prosecution is barred in the absence of an exception; the defendant should show that no exception exists.[44] These cases were accordingly overruled by *Bustamante*. There is a conflict of opinion on the matter in other jurisdictions.[45] It would seem that it is important to have a definite rule one way or the other, but it does not matter greatly which rule is adopted.

The difficulties involved in successfully convicting Bustamante point up the fact that embezzlement, including embezzlement by public officers of public funds, should be treated differently from other crimes by the statute of limitations. Often the actual embezzlement is followed by a long period of successful juggling of the books by the embezzler, who stays on the job (without "fleeing from justice") to prevent discovery. He often succeeds for a long enough period for the statute to run. It is often difficult too for the prosecution to tell when the embezzled moneys were taken; often it knows only that they were taken sometime between the times when the defendant began his employment and when his wrongdoings were discovered. Some other jurisdictions sensibly have adopted a special rule for this particular crime.[46]

Miscellaneous Pre-Trial Matters

Colorado procedure requires that the names of the prosecution witnesses be endorsed upon the accusation. In one case the trial court properly exercised its discretion to allow the prosecution to call a witness not so endorsed, where the defendant did not, as he might have done, ask for a continuance if surprised.[47]

The same case upheld minor amendments to a larceny information before and during trial, in order to make the proof conform to the allegations concerning the description of the stolen property, since no prejudice to the defendant resulted from these amendments.

Another case emphasized the discretion of the trial court ruling on a challenge for cause on *voir dire*.[48]

Evidence at the Trial

Some of the Colorado criminal cases of 1958 involved problems of evidence, [49] but as these matters are treated in a separate article,[50] they are not discussed here.

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[43] The indictment alleged that defendant, a public officer (county clerk), between May 24, 1953, and October 19, 1954, embezzled $1689 of public money. The offense being a misdemeanor, Bustamante v. People, 133 Colo. 497, 297 P.2d 538 (1956), subject to the eighteen months statute of limitations, and the indictment not having been returned until Feb. 28, 1955, twenty-one months after May 1953, prosecution was held barred by the statute of limitations.

[44] *E.g.*, Packer v. People, 26 Colo. 306, 57 Pac. 1087 (1899).

[45] Compare People v. Kaplan, 143 Misc. 91, 256 N.Y. Supp. 874 (1932) (statute of limitation cannot be raised by demurrer to the indictment but only by plea of not guilty) with People v. McGee, 1 Cal. 2d 611, 36 P.2d 378 (1934) (statute of limitations is "jurisdictional" rather than a matter of affirmative defense and may be raised at any time, before or after judgment).

[46] *E.g.*, Wis. Crim Code § 939.74 (1955) (extension of time to one year after discovery of loss if less than five years from the embezzlement); see Am. Law Inst., Model Penal Code § 1.07 (3)(a) and (b) (extension of time to one year after discovery if no more than three years longer than ordinary statute period).

[47] Gorum v. People, 320 P.2d 340 (Colo. 1958).

[48] Leick v. People, 136 Colo. 535, 322 P.2d 674 (1958) (prospective juror states he has formed an opinion concerning defendant's guilt but can put it aside and be governed by the evidence and the court's instructions).

[49] *E.g.*, Leick v. People, *supra* note 45 (confessions of co-conspirators; admissions of defendant; confession not coerced though confessor not advised of right to counsel or warned that confession might be used against him; one need not be doctor to give an opinion as to sanity; burden of proof in criminal insanity cases); Gorum v. People, 320 P.2d 340 (Colo. 1958) (evidence of similar offenses); Mitchell v. People, 320 P.2d 342 (Colo. 1958) (prior convictions to impeach defendant who takes the stand; the prior convictions were alleged for habitual criminal purposes); Davis v. People, 321 P.2d 1103 (Colo. 1958) (defendant's recent possession of goods obtained by burglary sufficient to sustain conviction for burglary).

[50] See One Year Review of Evidence, *infra* page 53.

Other Trial Matters

One case held that although the prosecution may have introduced insufficient evidence to prove the commission of the alleged crime by the defendant, so that a motion for directed verdict at the close of the prosecution's case should have been granted, yet the defendant, when presenting his case, may fill the gap in the prosecution's proof, thus curing the defect, so that a motion for the directed verdict should no longer be granted.[51]

In most states the defense of insanity at the time of the alleged crime is raised by a not-guilty plea. A minority of states, including Colorado, require a special plea of "not guilty by reason of insanity." Colorado is one of two states which make provision for a trial on the insanity issue alone separate from the trial on all other issues. The *Leick* case[52] upheld the Colorado procedure splitting the trial into two parts, but it held that although the trial is composed of two parts, it is only one trial, leading to one judgment, so that there cannot be an immediate appellate review of the insanity part before the trial on the other issues is had.

The *Leick* case also held that it is not reversible error for the district attorney in closing argument to read from the reporter's transcript concerning testimony at the trial, so long as he does not say he is doing so or, if the fact is known, so long as the court tells the jury that what the witnesses had said is not necessarily true just because reduced to writing.

[51] Tucker v. People, 136 Colo. 581, 319 P.2d 983 (1957, adhered to on rehearing 1958).
[52] Leick v. People, 136 Colo. 535, 322 P.2d 674 (1958).

A plea of guilty to an accusation containing, in addition to a count charging the substantive offense, other counts charging prior offenses for habitual criminal purposes, obviates the necessity of proof of the prior offenses.[53]

Appellate Review

In a 1957 case[54] the supreme court recognized the binding effect of the United States Supreme Court's *Griffin* case[55] upon Colorado law; Colorado is required to furnish at state expense a free transcript of trial proceedings at the indigent defendant's request, in order to equalize justice as between the rich and the poor. A 1958 Colorado case[56] adds a limitation to this rule: the trial court need not order such a transcript if it would be "a vain and useless thing"—meaning doubtless that the trial court is certain that no reviewable reversible error occurred which could serve as the basis of an appellate review.

The general rule, that there will be no appellate review of trial errors unless objected to at the trial and later urged upon a motion for new trial, was held in the same case to apply to a defendant who elects to act as his own attorney.[57]

Double Jeopardy

In *Markiewicz v. Black*[58] defendant was charged with assault with intent to rob *X* and pleaded guilty. In connection with the sentence the district attorney, who had several robbery cases to prosecute, got confused as to which defendants had robbed whom, and so he brought *Y* to court instead of *X*; thereupon the trial judge dismissed the case. A new prosecution for assault to rob *X* was then begun. Without passing upon the correctness of the trial court's dismissal,[59] the supreme court held that, since the trial court had dismissed the prosecution once begun, the defendant had been in jeopardy, and a new prosecution would violate his right not to be placed twice in jeopardy. In a non-jury case jeopardy attaches as soon as the accused, on arraignment, has pleaded, the court states. It would seem that the same rule would apply in a case where the plea was not guilty but a jury was waived. In a jury trial on a not-guilty plea jeopardy attaches when the jury is impanelled and sworn.[60]

Habeas Corpus and Coram Nobis

The supreme court considered several habeas corpus cases in 1958. Although recognizing that for most purposes habeas corpus proceedings are considered to be civil rather than criminal proceedings, even when brought by prisoners convicted of crime, the court held that habeas corpus may not be brought as a class action by some prisoners in behalf of themselves and others similarly situated;[61] and also that the court which finds that a prisoner is entitled to release in habeas corpus proceedings cannot properly stay the execution of its order for release

[53] Vigil v. People, 322 P.2d 320 (Colo. 1958).
[54] In re Patterson, 136 Colo. 401, 317 P.2d 1041 (1957).
[55] Griffin v. Illinois, 351 U.S. 12 (1956).
[56] Kirkendoll v. People, 331 P.2d 809 (Colo. 1958) (defendant pleaded guilty to conspiracy to rape and received a stiff sentence; the severity of sentence is not reviewable).
[57] Apparently defendant either could afford counsel or refused appointed counsel. But if one *must* act as his own attorney because he is indigent and no counsel is offered him, this rule seems too harsh.
[58] 330 P.2d 539 (Colo. 1958).
[59] It would seem that the trial judge should have continued the case until X could appear to testify that the defendant had tried to rob him.
[60] 2 King, Colorado Practice Methods § 2389 (1955).
[61] Riley v. Denver, 324 P.2d 790 (Colo. 1958) (an aftermath of the *Merris* case; habeas corpus was brought on behalf of those imprisoned as a result of municipal court trials in violation of the principles of that case).

pending a determination on appellate review of the correctness of the order to discharge.[62] As it turned out, on review, in the case where the stay was requested, the order was incorrect,[63] but, as the court pointed out, little would be left of the writ of habeas corpus if the prisoner, held to be entitled to discharge, could yet be held "during all the weary process of an appeal begun without leave and languidly continued."[64]

On the other hand the court disapproved of a trial court practice of appointing counsel to represent a prisoner during habeas corpus proceedings, on the ground that the proceedings are civil rather than criminal.[65]

As to grounds for habeas corpus, Colorado takes a very narrow view,[66] limiting the writ's scope to situations where the convicting court lacked jurisdiction over the offense or over the defendant or gave a sentence beyond the limits provided by the statute; and by "jurisdiction" in habeas corpus matters the court seems to mean jurisdiction in the

[62] Geer v. Alaniz, 326 P.2d 71 (1958) (also an aftermath of the *Merris* case).

[63] Geer v. Alaniz, 331 P.2d 260 (Colo. 1958). Here petitioners convicted at municipal court trials conducted procedurally on the assumption that the trials were for civil wrongs, and sentenced to imprisonment, were not entitled to habeas corpus, since by failing to object they waived their constitutional rights. But aside from the waiver, the Colorado view is that violations of constitutional rights (e.g., to jury trial, to counsel, not to incriminate one's self) are not grounds for habeas corpus. See Lewis v. Tinsley, 330 P.2d 532 (Colo. 1958), discussed below at note 67 and accompanying text.

[64] A quotation from Chief Justice Cardozo, in People ex rel. Sabatino v. Jennings, 246 N.Y. 258, 158 N.E. 613, 614 (1927).

[65] McGrath v. Tinsley, 328 P.2d 579 (Colo. 1958).

[66] Freeman v. Tinsley, 135 Colo. 62, 308 P.2d 220 (1957), *cert. denied*, 355 U.S. 843 (1958), discussed in Scott, One Year Review of Criminal Law and Procedure, 35 DICTA 26, 28, 34-35 (1958).

narrow sense of power to hear and decide.[67] The 1958 case of *Lewis v. Tinsley*[68] continued this narrow viewpoint, holding that petitioner's allegations that he was unrepresented by effective counsel, was insane when arraigned, and was coerced into pleading guilty to robbery and assault with intent to murder—these allegations alleged no grounds for habeas corpus. This follows because there was no allegation of lack of jurisdiction or sentence beyond statutory limits and because the petitioner after conviction never applied for a writ of error.

It is quite clear that the *Lewis* allegations if true, as they should be assumed to be on a petition for habeas corpus,[69] disclose violations of constitutional rights under both the federal and state constitutions. It is also quite clear that as a practical matter the conviction was not effectively appealable. An insane person can hardly appeal. Even a sane man without adequate counsel cannot effectively obtain appellate review, and the coercion which produces a guilty plea generally continues long enough to prevent appeal.[70] In other words, the matter which violates the constitution may also effectively prevent appellate review. Furthermore, on writ of error it is generally not possible to review matters not in the record, and the insanity of the defendant and the coercion of the guilty plea would not normally appear there.

There is therefore a serious gap in Colorado's scheme of justice in cases of criminal convictions which are not effectively appealable obtained in violation of state or federal constitutional rights. Habeas corpus, if limited to jurisdictional matters, is too narrow to be of much help. The gap must be filled, it would seem, by that other post-conviction remedy of uncertain scope—the writ of error coram nobis (perhaps today called "motion to vacate judgment of conviction")—which should in Colorado be as broad as habeas corpus is narrow. The three writs—the writ of error, the writ of habeas corpus, and the writ of error coram nobis—must in combination afford adequate remedies for relief against constitutional violations if the administration of justice in Colorado is to measure up to the high standards which Colorado defendants deserve.

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[67] Compare the word "jurisdiction" in prohibition cases, e.g., Bustamante v. District Court, 329 P.2d 1013 (Colo. 1958) (no jurisdiction over a prosecution barred by the statute of limitations).

[68] 330 P.2d 532 (Colo. 1958).

[69] Very likely they were not actually true but the truth may be determined at a hearing when the writ is granted. No such hearing was, of course, ordered here, since the writ was denied.

[70] In Colorado a supreme court rule provides that a writ of error must be brought within six months after judgment.